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No. 98-584

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF OHIO, ALABAMA, ARIZONA, COLORADO, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, MARYLAND, MICHIGAN, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WYOMING AND THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA IN SUPPORT OF PETITIONER

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
DAVID M. GORMLEY
ROBERT C. MAIER
Assistant Attorneys General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 466-8980
Counsel for *Amici* States

17pp

BILL PRYOR
Attorney General
State of Alabama

GRANT WOODS
Attorney General
State of Arizona

GALE A. NORTON
Attorney General
State of Colorado

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

MARGERY S. BRONSTER
Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

JAMES E. RYAN
Attorney General
State of Illinois

JEFFREY D. MODISETT
Attorney General
State of Indiana

THOMAS J. MILLER
Attorney General
State of Iowa

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

SCOTT HARSHBARGER
Attorney General
Commonwealth of Massachusetts

FRANK J. KELLEY
Attorney General
State of Michigan

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

PHILIP T. McLAUGHLIN
Attorney General
State of New Hampshire

PETER VERNIERO
Attorney General
State of New Jersey

DENNIS C. VACCO
Attorney General
State of New York

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

CHARLES M. CONDON
Attorney General
State of South Carolina

MARK BARNETT
Attorney General
State of South Dakota

JOHN KNOX WALKUP
Attorney General
State of Tennessee

JAN GRAHAM
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

DARRELL V. McGRAW
Attorney General
State of West Virginia

GAY WOODHOUSE
Attorney General (Acting)
State of Wyoming

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INTEREST OF THE AMICI

Amicus State of Ohio and 29 other amici States write to support the California State Board of Equalization and to urge the Court to grant the petition. The question presented goes to a core area of State sovereignty: the extent to which the Eleventh Amendment protects the integrity of the States' tax laws from second guessing in federal district courts.

Under Section 306 of the Railroad Revitalization and Regulatory Reform Act ("4-R Act") Pub. L. No. 94-210, 90 Stat. 33 (1976), Congress not only imposed a "prohibition on discriminatory state taxation of railroad property," *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987), but also gave railroads authority to seek declaratory and injunctive relief in federal court challenging disagreeable State taxes. *See* 49 U.S.C. § 11501(b) and (c). In view of this Court's decisions in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the question is whether the power Congress has assumed under the 4-R Act can be squared with the power the Constitution reserves to the States under the Eleventh Amendment. We respectfully submit that it cannot be.

The States have an immediate and significant stake in the matter. At a basic level, of course, "the integrity of [the States'] own processes is of particular moment" whenever State tax laws are in question. *Arkansas v. Farm Credit Services*, 117 S. Ct. 1776, 1780 (1997). Just as importantly, virtually every State assesses railroad property values and levies ad valorem taxes on rail transportation property, just as each State imposes taxes on other commercial, industrial and personal property. And in every State, taxpayers -- be they corporations or individuals -- enjoy State-created remedies for challenging such tax assessment and collection practices. These remedies usually reflect each State's unique tax laws, and virtually all (if not all) States have specialized tribunals with expertise over such questions. Under these circumstances, the 4-R Act's

jurisdictional grant to federal courts exacts a particularly high cost. It forces States to defend challenges to their tax policies for one particular class of property in a federal venue notwithstanding the creation of specialized state-tax venues already suited for the task and notwithstanding the availability of eventual review of state-court tax decisions (involving federal law) by this Court.

The case matters to the States for another reason. In subjecting California to suit in federal court, the Ninth Circuit diluted *Seminole Tribe* and *City of Boerne* to the point of meaninglessness. The former makes clear that Congress may not use its Commerce Clause powers to abrogate the States' Eleventh Amendment immunity from suit. And the latter makes clear that Congress may not use section five of the Fourteenth Amendment as an ersatz Commerce Clause. Under both decisions, Congress may remedy only unconstitutional State action, not State action with which the national legislature disagrees. Yet here there has been no showing that the States have been, or are about to, violate the constitutional rights of railroads. Nor did the Ninth Circuit make a contrary finding, as indeed it could not have. Railroad interests in this country have historically been more likely to receive favored than disfavored treatment. And, in the end, they have as little in common with the types of suspect classes that normally receive Fourteenth Amendment protection as any interest group in the country.

Finally, this case affects the States in more than just fiscal terms. Indeed, it demeans *City of Boerne* and *Seminole Tribe* to assume that they protect only State govenment fiscs. The first principles of a limited national government embodied in these landmark decisions do more than just that. They ultimately further the transcendent goal of federalism: that individual liberty is best secured by dividing the country into national and State governments, each with well-preserved and separate sovereign powers. In the hope of preserving the

vitality of these critical principles, the *amici* States submit this brief for the Court's consideration.

REASONS FOR GRANTING THE WRIT

I. THE ISSUE IS A RECURRING ONE AND THE NINTH CIRCUIT'S RESOLUTION OF IT CONFLICTS WITH THE REASONING OF OTHER FEDERAL COURTS.

In the aftermath of *Seminole Tribe* and *City of Boerne*, the lower federal courts have reached conflicting results in defining the scope of Congress's power under section five of the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity from suit in federal court. Be it in the context of claims under the Age Discrimination in Employment Act, compare *Coger v. Board of Regents*, 154 F.3d 296 (6th Cir. 1998), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Nov. 18, 1998) (No. 98-821), with *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822 (8th Cir. 1998); claims under the Family and Medical Leave Act, compare *Knussman v. State of Md.*, 935 F. Supp. 659 (D. Md. 1996), with *Thomson v. Ohio State Univ. Hosp.*, 5 F. Supp. 2d 574 (S.D. Ohio 1998); or claims under Congress's power to regulate copyrights and patents, compare *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343 (Fed. Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3259 (U.S. Sept. 28, 1998) (No. 98-531), with *Chavez v. Arte Publico Press*, 157 F.3d 282 (5th Cir. 1998), *reh'g en banc granted* (Oct. 1, 1998), the lower courts have struggled to ascertain the proper sphere of national power under section five of the Fourteenth Amendment. A similar divergence of opinion has characterized recent 4-R Act decisions.

On one side of the ledger, the Ninth Circuit held in this case and in an earlier decision, *see Oregon Short Line R.R. v. Department of Revenue Oregon*, 139 F.3d 1259 (9th Cir. 1998), that Congress properly exercised its Fourteenth Amendment authority in passing the 4-R Act. In the Ninth Circuit's view, the 4-R Act satisfies the remedial prerequisites of *City of Boerne* because it is designed to correct discriminatory state tax practices and thus protects the equal-protection rights of the railroads. *See also Wheeling & Lake Erie Ry. v. Public Util. Comm'n*, 141 F.3d 88 (3rd Cir. 1998) (same); *Consolidated Rail Corp. v. State Bd. of Equalization and Assessment*, 1996 U.S. Dist. LEXIS 21989 (S.D.N.Y. 1996) (same); *Fox River Valley R.R. v. Department of Revenue*, 863 F. Supp. 893 (E.D. Wisc. 1994) (same).

On the other side of the ledger, several lower federal courts have reached precisely the opposite conclusion. In *Union Pac. R.R. v. State of Utah*, 996 F. Supp. 1358 (D. Utah 1997), the court held that the 4-R Act is designed to promote and protect interstate commerce, not to ensure the equal protection rights of railroads.

> [A]lthough Congress in passing the 4-R Act was clearly concerned about the discriminatory taxation of railroads, it cannot be said that there is a sufficiently strong connection between protection of railroads and recognized Fourteenth Amendment goals that would permit a conclusion that the 4-R Act . . . is legislation passed to enforce the Fourteenth Amendment.

Id. at 1362.

Following a similar course, another federal court found that the Act was passed to "strengthen the transportation infrastructure of the United States," an "admirable goal" that

was "well within the power of Congress acting pursuant to the Interstate Commerce Clause," but one that does not satisfy the remedial and proportionality requirements of *City of Boerne*. *Union Pac. R.R. v. Burton*, 949 F. Supp. 1546, 1554 (D. Wyo. 1996). The commercial objectives of the Act, said the court, "are far afield" from the objectives of the Fourteenth Amendment," *id.*, and therefore it does not constitute permissible legislation under Congress's section five powers.

In similar fashion, a district court in West Virginia refused to accept jurisdiction over a 4-R Act claim. Rejecting the argument that Congress had passed the 4-R Act to remedy past discrimination against railroads, the court found nothing in the "legislative purpose and predicate" of the law "evidencing a purpose to enforce rights under the Fourteenth Amendment." *CSX Transp., Inc. v. Board of Pub. Works*, 997 F. Supp. 749, 752 (S.D.W.Va. 1997), *rev'd. on other grounds*, 138 F.3d 537 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 63 (1998). Absent that remedial purpose, the court held, "the attempted abrogation of Eleventh Amendment immunity in the 4-R Act was ineffective because Congress did not legislate pursuant to a valid exercise of power." *Id.*

In another federal decision on point, a divided panel of the Third Circuit upheld the congressional abrogation. *See Wheeling & Lake Erie Ry. v. Public Util. Comm'n*, 141 F.3d 88 (3rd Cir. 1998). In dissent, however, Judge Garth reasoned:

> By enacting the 4-R Act, Congress was not legislating to prevent unconstitutional behavior. There is no evidence that the discriminatory taxation which Congress intended to prohibit under the 4-R Act ever rose to the level of a constitutional violation such that the railroads were deprived of their right to equal protection. *See, e.g., Nashville Chattanooga & St. Louis Ry.*

> *v. Browning*, 310 U.S. 362, 60 S. Ct. 968, 84 L. Ed. 1254 (1940) (holding that higher tax burden placed upon railroad property did not violate the Equal Protection Clause). Without such evidence, we have no basis to conclude that Congress had the power to enact the 4-R Act pursuant to its enforcement power under the Fourteenth Amendment.

Id. at 99.

Weighing the lessons of *City of Boerne*, while noting that disparate classifications of railroad property for tax purposes have always been viewed as constitutionally permissible, *see Nashville, Chattanooga & St. Louis Ry.*, 310 U.S. at 369 ("so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another"), Judge Garth concluded:

> Congress cannot make constitutional classifications unconstitutional, even though it can make such classifications unlawful. That is precisely what the 4-R Act did: it prohibited long-standing constitutionally permissible discriminatory taxation practices. It did not -- indeed, could not -- make such discrimination unconstitutional.

Id. at 100.

Even these differences of opinion among a host of Article III judges do not fully convey the need to resolve this issue. Since its passage in 1976, the 4-R Act has spawned hundreds of federal and state court challenges by railroads to State tax assessments and collections. While the merits of those cases turn on the particularities of each State's tax system and

the individualized assessments made by State or local tax authorities against particular property, there is one constant in every federal court 4-R Act case: the States' sovereign immunity. Resolution of the immunity issue in this or any other 4-R Act case depends not at all on State tax law or on the assessed value of particular property but rather on the unchanging words of the Eleventh and Fourteenth Amendments. Waiting for other federal circuits to weigh in on the question will not make the issue any more clear than it is today.

There is, in short, a split of authority on the question, with the Third and Ninth Circuits, together with two district courts, holding that the 4-R Act is a remedial response to discrimination against railroads, and three district courts (together with one circuit court judge in dissent) concluding that it is not. The widening split warrants prompt review.

II. THE NINTH CIRCUIT'S DECISION DISREGARDS *SEMINOLE TRIBE* AND *CITY OF BOERNE*.

The Ninth Circuit's holding -- that Congress may promote the economic interests of railroads under its Fourteenth Amendment enforcement powers -- is manifestly wrong. The Ninth Circuit held that Congress may abrogate the sovereign immunity of the States under the Eleventh Amendment through its Fourteenth Amendment enforcement powers. Taking the view that State tax laws may discriminate against railroads, the court found that Congress has the ability to enforce the railroads' equal protection rights by abrogating the States' Eleventh Amendment immunity. This interpretation, however, cannot be squared with *Seminole Tribe* and *City of Boerne*.

The 4-R Act provides that railroads may challenge State tax assessments and collection efforts in federal courts. 49 U.S.C. § 11501(c). The law thus "contains a clear legislative

statement of the intent of Congress to abrogate the States' immunity from suit in federal court." *Burton*, 949 F. Supp. at 1552. Therefore, as in *Seminole Tribe*, the inquiry is "narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?" *Seminole Tribe*, 517 U.S. at 59. In other words, does the Fourteenth Amendment grant Congress the power to abrogate the State's sovereign immunity in railroad tax cases?

In the Ninth Circuit's view, two factors support congressional power. First, there is "little doubt" that "discriminatory state taxation can implicate equal protection concerns." *Oregon Short Line*, 139 F.3d at 1266. Second, even though some classifications prohibited by the 4-R Act "might have been sustainable against an equal protection challenge in the Supreme Court, . . . Congress could eliminate all railroad specific discrimination, even if it eliminated more practices than the Supreme Court itself would have done" and "[t]herefore, § 11501 is a constitutionally sound enactment, which abrogated the State's Eleventh Amendment immunity, because Congress could draw on its authority from § 5 of the Fourteenth Amendment." *Id.* at 1267. The lower court is wrong on both counts.

First, while it may theoretically be possible for States to violate the equal protection rights of rail carriers, they may only do so by treating rail carriers differently from other similarly-situated businesses, and even then only when the differential treatment is irrational in nature. "Conceptually . . . any notion of discrimination assumes a comparison of substantially similar entities." *General Motors Corp. v. Tracy*, 117 S. Ct. 811, 824 (1997) (rejecting equal protection challenge to Ohio's tax distinction between sales by regulated utilities and sales by unregulated natural gas distributors). *See also Vacco v. Quill*, 117 S. Ct. 2293, 2297 (1997) (the equal protection clause

"embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly") (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.")).

Accordingly, when confronted with evidence of past discrimination, Congress may promote similar treatment for similarly situated persons, as for example Congress has done through the voting rights laws. But the 4-R Act does no such thing. It instead mandates that rail transportation property be treated like other commercial and industrial property -- regardless of whether that other property is in any way similar to rail property. No matter how materially the uses of rail property may differ from the uses of, say, robot welders in an industrial plant, or shelving in a retail store, and no matter how important the distinction weighs in effectuating the otherwise legitimate purposes of State taxing policy, Congress has barred the States from drawing any such distinction.

On this record and under these circumstances, the 4-R Act in no way "enforces" the equal protection rights of railroads; it expands them. For it mandates precisely what equal protection does not: equal treatment of *differently* situated persons and things. What Congress has instead done is promote interstate rail commerce by affirmatively tying rail-tax rates to the sometimes lower tax rates for other businesses. In doing so, Congress has substituted its judgment favoring interstate rail commerce for the potentially different judgments of the 50 State legislatures. While this may constitute a legitimate exercise of power under the Commerce Clause, *see Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992) (acknowledging that the Commerce Clause gives Congress "free[dom] to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes"),

it does not stick to the contours of Congress's carefully-proscribed section five powers.

Nor can the railroads justify this type of preferential treatment on the ground that the States have engaged in a pattern and practice of violating their equal protection rights in the past. Time and time again, the Court has permitted the States to treat railroad property differently from the property of other businesses. *See, e.g., New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 579 (1938) ("Carriers may be treated as a separate class . . . and, as such, taxed differently or additionally."); *Atlantic Coast Line R.R. v. Daughton*, 262 U.S. 413, 424 (1923) ("The State might, consistently with the equal protection clause, have subjected only public service corporations to the income tax, or it might have laid upon them a higher income tax than upon others, as it laid upon railroads a higher franchise tax than it did upon other corporations."); *Southern Ry. Co. v. Watts*, 260 U.S. 519, 530 (1923) ("Railroads differ in so many respects from other properties that they may, as a class, be taxed differently or additionally, if that is not inconsistent with the constitution of the State."); *Kentucky R.R. Tax Cases*, 115 U.S. 321, 337 (1885) ("There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the legislature has seen fit to impose.").

Second, the Ninth Circuit's approach knows no bounds. It ultimately establishes an horizonless grant of congressional power to abrogate the States' immunity. If correct, it permits every burden on interstate commerce to be recast as "discrimination" against those persons or entities whose costs rise due to State regulation, thereby inviting a preemptive Fourteenth Amendment remedy whenever the congressional will

arises. *See General Motors*, 117 S. Ct. at 824 n.12 (distinguishing "discrimination" analysis from "burdens" analysis under the Commerce Clause). The Ninth Circuit slips easily around *Seminole Tribe* and apparently reverts back to the now-discarded teachings of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), by finding equal protection concerns hidden beneath a law heretofore thought to be grounded in the Commerce Clause. *See Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987) (noting that the 4-R Act was enacted "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States") (quoting 45 U.S.C. § 801(a)). In the final analysis, the Ninth Circuit's reading of *City of Boerne* gives Congress authority to create a federal forum for virtually any legal remedy available against the States, leaving little teeth in *Seminole Tribe* or in the Eleventh Amendment itself.

An additional problem lurks here as well. Even if *City of Boerne* and *Seminole Tribe* somehow permitted the abrogation of the States' immunity from suit because of past disparate tax treatment accorded by the States to railroads, another component of *City of Boerne* affirmatively bars that abrogation now. In *City of Boerne*, the Court made clear that Congress's power under section five of the Fourteenth Amendment is remedial, not substantive. 117 S. Ct. at 2164. Part and parcel of that conclusion is that there must be "a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." *Id.* at 2169. Just such a congruence existed under the Voting Rights Act but not under the Religious Freedom Restoration Act (RFRA). *Id.* at 2169-70. Prior to the Voting Rights Act, there had been numerous examples of generally-applicable laws passed because of racial animus, making Congress's response proportionate to a great and widespread evil in the States. Prior to RFRA, in pointed

contrast, there were no modern examples of laws passed because of religious bigotry. RFRA therefore was properly found to be a disproportionate response to the alleged problem of general laws having an incidental effect on religious practices.

The 4-R Act, as applied to the States, falls on the RFRA, not the Voting Rights Act, side of the section five line. It does so both in the sense that it contravenes the numerous cases in which this Court has found no barrier in the Constitution to the type of distinctions condemned by the Act, and in the sense that requiring rail carriers to be treated just like differently-situated businesses sweeps so broadly beyond equal protection values that the Act would fail the *City of Boerne* requirements of "congruence and proportionality." *See also Quill,* 504 U.S. at 318 (acknowledging that "Congress has the ultimate power to resolve" the question of tax nexus under the Commerce Clause, but presumably no such power to alter due process standards). The 4-R Act represents an unwarranted response to an unproven, and indeed virtually nonexistent, harm, and intrudes unnecessarily in an area -- State taxation -- where the States are supposed to enjoy "considerable latitude." *Commonwealth Edison v. Montana,* 453 U.S. 609, 622 (1981).

Congress itself has noted that its railroad laws, including the 4-R Act, are designed "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense." 49 U.S.C. § 10101(4). Congress of course has every right to make those judgments, but it must do so under its Article I powers, not the Fourteenth Amendment. Some may view the States' disparate tax treatment of railroad property as unfair or improper, but unless it violates the Constitution -- and this Court has said repeatedly that it does not -- Congress cannot abrogate the States' immunity from suit in federal court by enacting legislation designed to stop that disparate treatment.

And this is particularly true in matters of State taxation, a matter as close to the core of State sovereignty as any there is. "We have long recognized," the Court has emphasized, "that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995). *See also Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 108 (1981) ("'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.'") (quoting *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932)); *Dows v. City of Chicago*, 78 U.S. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.").

In spite of the Court's historic reticence to allow the national government to regulate State taxes, those opposed to unfair State taxation of railroads still have considerable power, for the 4-R Act -- aside from its grant of jurisdiction to the federal courts to hear legal challenges to State railroad tax assessments -- remains good law. State tribunals are open in every State to hear 4-R Act claims, as well as any other legal challenge to the assessment or collection of State railroad taxes. Accordingly, even accepting the contention that the States have discriminated against railroads and their property, Congress's

"remedy" is out of all proportion to the alleged harm. The Court should accept the petition to reaffirm this foundational principle.

One might fairly ask why this case, and these issues, should not be resolved under *Ex Parte Young*, 209 U.S. 123 (1908). There are two reasons. One, the railroads filed this case against an agency of the State of California, not against one of the State's public officials. The "narrow" exception to the Eleventh Amendment established by *Ex Parte Young* "has no application in suits against the States and their agencies." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993). Two, even if this claim had been filed against a State official, *Ex Parte Young* still would not apply because the claim seeks retroactive relief. As the district court correctly found and as no party has contested, since plaintiffs are seeking to enjoin tax assessments that have already become final, they "are in fact seeking retroactive, rather than prospective injunctive relief with respect to the Board." *See* Pet. App. 20-21. The *Ex Parte Young* exception thus does not apply in this setting. *See Green v. Mansour*, 474 U.S. 64 (1985).

CONCLUSION

For the foregoing reasons, the Court should grant the writ.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
DAVID M. GORMLEY
ROBERT C. MAIER
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Amici States

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